United Nations E/C.19/2007/4/Add.1

Economic and Social Council

Distr.: General
15 March 2007

Original: English

Permanent Forum on Indigenous Issues
Sixth session
New York, 14-25 May 2007
Item 3 of the provisional agenda*
Special theme: "Territories, lands and natural resources"

Information received from Governments**

Australia

Summary

The present report outlines the Australian Government's policy on improving outcomes for Australian indigenous peoples by providing them with the tools to make better use of ownership of indigenous land. Broadly speaking, the policy is to ensure that the rights of indigenous people to land are recognized and that those rights are leveraged to provide economic and social benefits to indigenous people. The report outlines how this policy is being put into practice through reforms to land-rights legislation and the native title system.

Indigenous land reform in Australia

I. Indigenous land in Australia

1. Land is central to the lives and well-being of indigenous Australians. It underpins indigenous history and culture, is fundamental to indigenous peoples' spiritual beliefs and can provide an economic base. Indigenous people have acquired rights to and interests in land in Australia in various ways, and approximately 16 per cent of the continent is now owned or controlled by indigenous people.[1]

* E/C.19/2007/1.

** The submission of the present report was delayed to ensure the inclusion of the most recent information.

[1] *Overcoming Indigenous Disadvantage* report, 2005. This does not include land in respect of which there are native title rights and interests.

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2. Statutory land-rights regimes are a key way in which indigenous people have acquired interests in land. Every state and territory in Australia, with the exception of Western Australia, has some form of statutory land-rights regime. They have led to the granting of land to indigenous communities as a result of claims or transfer processes established by legislation.

3. The first land-rights legislation to allow for indigenous people to make claims to land was the Aboriginal Land Rights (Northern Territory) Act 1976. The basis of that regime was the findings and recommendations of the Woodward Commission, which was established by the Australian Government to inquire into Aboriginal land rights. The Act provides for the granting of traditional Aboriginal land in the Northern Territory to Aboriginal land trusts, which hold the land for the benefit of the traditional Aboriginal owners.

4. While the interests granted under land-rights legislation vary, the most widespread form of tenure is an inalienable freehold title that is held on a communal basis. Under this form of tenure, Aboriginal people as a group, rather than as individuals, have ownership of a particular area of land and are prohibited from selling their interest. There are often other legislated restrictions that limit indigenous people's ability to deal with their interests in land. Those restrictions can take the form of a prohibition on mortgage or the imposition of consent requirements and maximum terms for the grant of a lease. The rationale for the restrictions is the need to ensure that the land is available for future generations to enjoy. However, the limitations the restrictions have placed on opportunities for economic development have brought into question the desirability of maintaining the current level of restrictions, and the possibility of striking a more appropriate balance is being explored.

5. In addition to statutory land rights, native title rights have been recognized since the decision of the High Court of Australia in the *Mabo* case.[2] Unlike statutory land rights, which involve the granting of various interests through legislation, native title involves the recognition of pre-existing rights and interests. Native title is the recognition, in Australian law, that some indigenous people continue to hold rights to lands and waters that derive from their traditional laws and customs. Native title rights and interests may range from the exclusive right to possess, occupy, use and enjoy land and waters to lesser rights and interests, such as the right to hunt, fish and gather.

6. The Native Title Act 1993 was enacted following the *Mabo* decision to provide a system for the recognition of these rights. The Act includes a future acts regime, which regulates future development affecting native title rights and gives native title holders and claimants the right to negotiate about some future acts. The Act also provides for the making of indigenous land-use agreements, which are voluntary agreements between a native title group and other people about the use and management of land and waters.

7. Apart from the granting of statutory land rights and recognition of native title rights, there are various other ways in which indigenous people have acquired rights and interests to land in Australia. The Aboriginal and Torres Strait Islander Land Fund was established in recognition that many indigenous people would be unable to assert their native title rights owing to dispossession. The Indigenous Land

[2] *Mabo vs. Queensland* (No. 2) (1992) 175 CLR 1.

Corporation receives money from the Fund to purchase and manage land for indigenous Australians. In other parts of Australia, land has been reserved for the benefit of indigenous people. For example, in Western Australia, where there is no land-rights legislation, large tracts of land are Aboriginal reserves. Ownership and joint management of national parks is another way in which indigenous people have gained control over land.

8. The Australian Government is currently implementing reforms with regard to indigenous land, particularly in respect of native title and land rights. The aim of these reforms is to ensure that an efficient system is provided for the recognition of rights to land and that those rights can provide social and economic benefits to indigenous people.

II. Land-rights reform: Aboriginal Land Rights (Northern Territory) Act 1976

9. The Aboriginal Land Rights Act, which was enacted more than 30 years ago, has been successful in returning land to traditional Aboriginal owners, and approximately 45 per cent of the Northern Territory is now owned or controlled by Aboriginal people.[3] However, the Act has not been particularly successful in terms of improving Aboriginal people's overall well-being. Despite having such a large land base, Aboriginal people have derived little lasting economic benefit from the land that they hold and remain socio-economically disadvantaged.

10. The primary objective of reforms to the Act is to facilitate a higher level of economic development on Aboriginal land. The reforms are aimed at achieving this goal while maintaining the inalienable, communal nature of the title to land, which is recognized as an important characteristic of the rights that Aboriginal people hold.

11. One of the most significant elements of the reforms is the introduction of a township leasing scheme. The voluntary scheme will facilitate home ownership and the establishment of businesses in townships, resulting in the normalization of those areas. Aboriginal land trusts will be able to enter into 99-year head leases with an entity to be established by either the Northern Territory Government or the Australian Government. The entity will then issue subleases, which can be mortgaged, to individuals and businesses. Negotiations have begun with several communities that have expressed an interest in the scheme.

12. The reforms also relax provisions that deal with the granting of other interests in Aboriginal land. To enable Aboriginal land trusts to grant such interests more freely, the consent of the Minister for Families, Community Services and Indigenous Affairs will be required in fewer circumstances. For example, the Minister's consent will now be required only when a lease or licence is granted for a term greater than 40 years (previously it was 10 years). So that financial institutions will be willing to accept a lease as security for a loan, advance consent can be provided for the mortgage or transfer of a lessee's interest.

13. The Australian Government understands that changes to land tenure arrangements alone do not ensure that indigenous people have the financial capacity

[3] Overcoming Indigenous Disadvantage report, 2005.

to support a loan. Consequently, the Australian Government is providing support to indigenous people through a programme for home ownership on indigenous lands. The programme, together with other, complementary measures, will provide access to affordable home-loan financing, discounts on the purchase price of houses and money-management training. This support will be available not only to people in the Northern Territory, but in jurisdictions across Australia where long-term leases over indigenous land are available. The Australian Government is now working with state Governments to ensure that indigenous people across Australia can have access to the programme.

14. In addition to changes to leasing arrangements, the reform of the Aboriginal Land Rights Act will promote economic development. For example, the reforms include provisions to expedite the negotiation period for the grant of a licence for exploration on Aboriginal land, while maintaining the traditional owner veto (power to withhold consent). Since exploration and mining are principal means by which Aboriginal people gain economic benefits from their land, these changes could have a positive impact. In addition, the reforms will encourage localized participation in decisions about the development of Aboriginal land. This will be facilitated through the delegation of land council powers to regional groups and the clarification of the procedures for the establishment of new land councils.

III. Native title reform: Native Title Act 1993

15. Native title has been recognized in Australia only since 1992 and thus is a much newer concept than statutory land rights. In the 14 years in which the native title system has been operating, 95 native title determinations have been made and 266 indigenous land-use agreements have been registered.[4] Nevertheless, a very large number of claims remain unresolved, and stakeholders across the system acknowledge that the current processes for recognizing native title rights remain expensive and slow.

16. Reforms to the native title system involve necessary structural changes to ensure that the system delivers effective outcomes more expeditiously for all parties and that the reaching of agreement is encouraged in preference to litigation. Some of the reforms will be implemented through legislative amendments,[5] while others will be achieved through non-legislative initiatives.

17. In order to limit the potential for wasted resources and unnecessary delay, the reforms will promote better coordination between the Federal Court of Australia and the National Native Title Tribunal, which both play important roles in the native title system. The Tribunal will be vested with primary responsibility for mediating native title matters, and opportunities for simultaneous mediation by the Federal Court and the Tribunal will be removed. To help ensure that mediation is effective, parties and their representatives will be required to mediate in good faith.

18. Consistent with the Australian Government's policy of encouraging the resolution of native title claims through agreement, proposed reforms will enable the

[4] As at 5 February 2007 (www.nntt.gov.au).

[5] The Native Title Amendment Bill 2006 was introduced into the Australian Parliament on 7 December 2006 and was referred to the Senate Legal and Constitutional Affairs Committee. At the time of writing, the Bill had not yet been passed.

Tribunal to issue recommendations and findings in respect of matters relating to claims. Although non-binding in nature, it is hoped that those recommendations and findings may provide guidance to parties, assisting them in reaching a negotiated outcome. New guidelines on funding for respondents in native title claims[6] provide another means of assisting parties in reaching agreement. The new guidelines will expand the circumstances in which funding is provided during the right-to-negotiate process while limiting the circumstances in which financial assistance is provided for court proceedings.

19. Reforms are also being made to the operation of native title representative bodies and prescribed bodies corporate. Native title representative bodies are funded by the Australian Government to provide legal and related services to native title claimants and holders under the Native Title Act, while prescribed bodies corporate are responsible for managing native title rights following a determination by the Federal Court of Australia that native title exists. The ability of native title claimants and holders to protect their rights and interests is intrinsically linked to the performance of native title representative bodies and prescribed bodies corporate.

20. The proposed reforms to native title representative bodies involve the replacement of the current system of indefinite recognition with fixed-term arrangements. The intended result is that they will become more focused on achieving outcomes for their clients. Reforms to prescribed bodies corporate will include expanding the circumstances in which native title representative bodies can assist them; improving their access to existing sources of assistance; permitting them to recover certain costs from land users who stand to benefit from access to native title land; and expanding the skill base available to them by allowing non-native title holders to become members when the native title holders want this to happen. These reforms are complemented by non-legislative measures such as the provision of training to build the capacity of native title representative bodies and prescribed bodies corporate.

21. Finally, the reforms are aimed at improving communication and transparency within the native title system. This is being achieved largely through regular meetings and forums involving all stakeholders. The result will be faster, more affordable and more effective native title outcomes.

IV. Conclusion

22. **The Australian Government is committed to the recognition of indigenous peoples' rights to land. However, this commitment is coupled with awareness that recognition alone will not reduce the disadvantage faced by indigenous Australians: symbolic recognition must go hand in hand with practical action. Consequently, the Australian Government is implementing reforms to ensure not only that rights to land are recognized, but that those rights are utilized in such a way as to provide social and economic benefits to indigenous people, now and in the future.**

[6] Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993.